

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HARMONY R. HERNANDEZ ¹)	
Claimant)	
VS.)	
)	
SUBWAY)	Docket No. 1,064,281
Respondent)	
AND)	
)	
HARTFORD FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of Administrative Law Judge Bruce E. Moore's May 10, 2013 preliminary hearing Order. E. Thomas Pyle, III, of McPherson, Kansas, appeared for claimant. Timothy A. Emerson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Moore found claimant failed to prove she suffered personal injury, as she failed to establish that she suffered a lesion or change in the physical structure of her body as a result of her September 20, 2012 accident. Judge Moore also ruled that claimant's subjective complaints were an aggravation of a preexisting condition and not compensable.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the May 9, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant asserts she has met her burden of proof that she sustained a personal injury by accident. Claimant argues she has suffered new physical findings or a change in the physical structure of the body, as evidenced by her symptoms and complaints that are different than what she experienced in connection with her 2008 accidental injury. She argues that she had more than a sole aggravation of her preexisting condition. Claimant requests the Board reverse Judge Moore's Order and find the claim compensable. Respondent maintains Judge Moore's Order should be affirmed.

¹ Claimant is now known as Harmony R. Aichele. (P.H. Trans. at 4).

FINDINGS OF FACT

Claimant has worked for respondent for three years and for the past two years as store manager of the Lindsborg, Kansas store.

Claimant has a history of back problems. In 2000 or 2001, claimant was working in the deli at Albertson's when she twisted her back while moving a 50 pound case of chicken. She experienced pain in her low to mid-back and was prescribed muscle relaxers. Claimant testified after being off work for a few days, her symptoms subsided and she had no further problems.

On August 23, 2008, claimant was working for Multi Community Diversified Services when she injured her low back while assisting a resident out of bed. She experienced pain across her back, with tingling into her legs. A September 23, 2008 lumbar spine MRI revealed central disk bulges and radial tears at L4-5 and L5-S1.

In early-2009, B. Theo Mellion, Ph.D., M.D., a neurosurgeon, performed an L5-S1 microdiscectomy. Dr. Mellion noted claimant did well after surgery, but developed some lower back pain and radiating buttock, hip and left leg pain with some numbness and tingling in the right leg for which he saw her again in July 2009. A July 17, 2009 MRI revealed some disc degeneration and Modic changes at L5-S1, as well as a small annular bulge at L4-L5 associated with some disc desiccation.

On July 27, 2009, claimant was evaluated at the request of her attorney by Paul S. Stein, M.D., a neurosurgeon. Dr. Stein noted claimant's pain is in the lower back with radiation into the right midcalf and into the left hip, but not into the left lower extremity. It was Dr. Stein's opinion that claimant suffered an aggravation of lumbar degenerative disk disease or a lumbar strain/sprain from her work accident on August 23, 2008. Dr. Stein issued an impairment of 5% to the whole person. Claimant did not have adequate findings to justify a rating for lumbosacral radiculopathy. While Dr. Mellion provided no restrictions, Dr. Stein provided restrictions to avoid lifting more than 40 pounds, lifting from below knuckle height, frequent and repetitive bending or twisting of the lower back, and to alternate sitting with standing after approximately 30 minutes. Claimant settled her claim for \$60,000 on a full and final basis.

Claimant testified she was asymptomatic from the time of her release in 2009 up until September 20, 2012, when she had an accident while working for respondent. On that date, claimant was attempting to put dishes on a shelf above her head when dishes fell down. She tried to get out of the way. Her foot got caught on some matting, causing her to twist her back. She experienced back pain radiating in her right hip with numbness and tingling into her right lower extremity. She initially treated her back with heat, Tylenol and ibuprofen, but when that failed to provide relief, she reported to respondent that she had injured her back in the accident and was sent to Lindsborg Community Hospital.

Clamant was seen at Lindsborg Community Hospital emergency room on September 21, 2012, for complaints of constant right-sided back pain with shooting pain down her right leg. Clamant was prescribed medication and advised to remain off work until September 24, 2012.

Claimant was referred by respondent to Peter DeWitt, M.D., whom she saw on October 1 and 12, 2012. At the time of these visits, claimant complained of pain in the upper right, mid right and lower right lumbar spine that radiates to the right buttock and right posterior thigh. Claimant was diagnosed with a lumbar strain. Dr. DeWitt prescribed medication and ordered physical therapy.

On October 24, 2012, claimant was seen by Rebecca Weller, M.D., at Memorial Hospital emergency room. Dr. Weller noted claimant heard a pop in her back last evening while bending over to do inventory. Claimant was diagnosed with low back strain and acute low back pain.

Respondent referred claimant to Dr. Mellion, who evaluated her on October 29, 2012. Claimant complained of lower back pain and stiffness with pain radiating into the buttocks and hips bilaterally, as well as some pain radiating into the right thigh with occasional tingling in the right calf. A lumbar spine MRI taken on October 29, 2012, revealed degenerative changes, but no herniated disc or central spinal canal stenosis. When comparing the current MRI with the 2009 MRI, Dr. Mellion noted there were no significant changes. Claimant was diagnosed with lumbar disc degeneration, herniated lumbar disc and lower back pain. Dr. Mellion recommended medication, a TENS unit, physical therapy and epidural steroid injections. Dr. Mellion was not enthusiastic about surgery helping claimant. He provided claimant with light duty restrictions and limited her to working four hours per day.

After claimant had six weeks of physical therapy, she was again seen by Dr. Mellion on December 10, 2012. Claimant reported back pain that radiated into the buttock, hip and leg, with some tingling in the right leg and foot. Dr. Mellion recommended epidural steroid injections and brought up the possibility of a two-level surgical fusion, which he noted could well worsen claimant's condition. Even though Dr. Mellion was still recommending epidural steroid injections that were not approved, he released claimant at maximum medical improvement and kept on her prior restrictions.

Dr. Mellion again examined claimant on January 24, 2013 and noted in his corresponding report that claimant had back pain radiating into the buttocks, hip and leg, with cramping in the calf and hamstrings. Dr. Mellion again recommended epidural steroid injections. He did not think a two-level fusion would significantly help claimant and such surgery would have an equal or greater chance of making her worse. Claimant was released from Dr. Mellion's care.

Claimant filed her application for hearing with the Director's office on February 19, 2013. She alleged injury to her low back, right hip, right leg and all body parts affected.

On March 4, 2013, claimant was seen at the Lindsborg Community Hospital emergency room by Marta E. Hantke, M.D., for complaints of right hip pain that extended across the back. The physical examination revealed no vertebral tenderness in the back and normal inspection of the right hip with no evidence of injury, as well as some tenderness in the right hip bone and right hip, with limited range of motion. Claimant was diagnosed with sacroilitis. Dr. Hantke indicated no x-rays were necessary based on the physical findings. Claimant was taken off work for three days.

On March 25, 2013, claimant was evaluated at her attorney's request by Dr. Stein. Claimant presented with right hip pain radiating down the back of the right thigh into the leg, and sometimes to the foot. Dr. Stein noted her "primary problem is the pain down the lower extremity, not really lower back pain itself." Dr. Stein did not review the October 29, 2012 MRI, but indicated the radiology report "does not reflect pathology adequate to explain the right lower extremity symptomatology." It was Dr. Stein's opinion that claimant's work injury was the primary and prevailing factor in claimant's current symptoms and need for treatment.

Dr. Stein was unable to make a definitive diagnosis, but noted "diagnostic possibilities" included piriformis syndrome (irritation of the sciatic nerve in the buttock as it passes under the piriformis muscle), radicular irritation not yet documented, and hip joint disease.² Dr. Stein recommended an "investigation" consisting of an MRI scan of the lumbosacral plexus and right hip/sciatic nerve, EMG/NCT of both lower extremities, and lumbar myelogram/CT scan if the above studies were negative.³ Dr. Stein provided temporary work restrictions of no lifting more than 20 pounds on an occasional basis and to avoid repetitive lifting, twisting from below knuckle height or above chest height, repetitive bending and twisting of the lower back, to sit 10 minutes for every two hours worked, and limit work to a six to eight hours per day, five days a week.

Subsequently, Dr. Stein reviewed the October 29, 2012 MRI scan and noted there was desiccation of the L5-S1 disk and moderate desiccation of the L4-L5 disk with relative preservation of disk space height. He saw no evidence of herniation or nerve root impingement to the right, nor encroachment on the right-sided nerve roots. He noted a small midline posterior annular tear and disk bulging centrally.

² P.H. Trans., Cl. Ex. 1 (Dr. Stein's March 25, 2012 report at 5).

³ *Id.*

On April 16, 2013, Dr. Mellion provided the following opinion after reviewing claimant's prior medical records and comparing the 2009 and 2012 MRIs:

I believe her work injury on September 20, 2012 is not the prevailing factor, but it is more likely than not an exacerbation of a previous condition.⁴

In a May 8, 2013 email to counsel, Judge Moore advised counsel:

[K]eep in mind that "prevailing factor" is not the determinative finding. Aggravation of a pre-existing condition is not compensable, absent a new lesion, notwithstanding a finding that an accident was the prevailing factor in aggravating the pre-existing condition. Changes in the MRI could be attributable to the progressive nature of the degenerative disc disease, and are not necessarily a product of the alleged work accident. It is Claimant's burden of proof to demonstrate that there is a new lesion as a result of the claimed work accident. Supposition is not evidence, and I traditionally give greater credence to the physician that saw the claimant both before and after the work injury, and who is thus in a better position to determine the potential effects of the work accident.

At the preliminary hearing, claimant was questioned regarding the difference in her symptoms between the 2008 and 2012 accidents. She testified in great detail how her 2008 injury resulted in low back pain that went into her legs, mainly the back of her right thigh, and caused tingling to about her right mid calf, but without residual problems after she was released by Dr. Mellion.⁵ Claimant testified that her 2012 accident resulted not only in back pain, but also right hip symptoms, sacroiliac symptoms, entire right thigh symptoms all the way down her right calf into her right foot and toes.⁶

Near the conclusion of the preliminary hearing, Judge Moore questioned if the claimant proved that she suffered personal injury, noting that complaints are not sufficient. Claimant argued her new and different symptoms had to have been caused by a change in the physical structure of the body. Judge Moore ruled from the bench:

Here's my problem. We've been focusing on prevailing factor, prevailing factor, prevailing factor. I think we need to stop and go back and determine whether we have an injury, and the injury means a lesion or change in the physical structure of the body. I don't have any lesion identified by any of the physicians. I have a physical therapist that diagnosed a sacroiliac joint dysfunction, but none of the orthopedists that have examined the claimant have come up with that diagnosis. All of the diagnoses focus on low back pain and potential radicular symptoms. There

⁴ P.H. Trans., Resp. Ex. A.

⁵ P.H. Trans. at 19, see also pp. 25, 42-44.

⁶ *Id.* at 22-23, see also pp. 24-29, 40, 42-44.

is no physician that has offered an opinion that claimant has suffered any hip injury, notwithstanding that's where her pain is manifest. So I have a problem in that I have some difficulty establishing that there was an injury within the meaning of the Workers' Compensation Act as a product of the September 20, 2012, accident. I don't dispute that there was an accident. I don't dispute that the accident was a prevailing factor in causing her subjective complaints, but the record fails to establish that there was an injury within the meaning of the Act suffered as result of that accident.

Further, I've got the surgeon that examined claimant, treated her, and performed surgery on her, saying that she has nothing but an exacerbation or aggravation of her preexisting condition. Even if I were to find an injury, I can't find it compensable if I've got an aggravation of a preexisting condition. So I don't have evidence of a lesion, or physical, change in the physical structure of the body. And I don't have any indication, other than the surgeon who's been in there saying that in his view this is not nothing more than an exacerbation of that preexisting condition.

Dr. Stein doesn't disagree with that. He would like to poke around and see if there's something else at risk, but he can't identify any lesion or change in the physical structure of the body based upon his examination. While he might want to perform some additional tests, it's the claimant's burden to establish injury and a new lesion, it's not the respondent's obligation to do that.

So based upon the failure to establish an injury, or that the injury claim's anything more than an aggravation of a preexisting condition, I must deny the claimant's preliminary hearing requests at this time.⁷

Judge Moore stated in his May 10, 2013 preliminary hearing Order that:

Claimant's preliminary hearing requests are considered and denied. While Claimant had an accident on September 20, 2012, she has failed to sustain her burden of proof of personal injury as a result of that accident. Claimant has failed to establish that she suffered a lesion or change in the physical structure of her body as a result of the alleged accident of September 20, 2012. While Claimant contends she has suffered subjective complaints as a result of the alleged work injury, Dr. Mellion opines that Claimant's current complaints are an aggravation or exacerbation of her previous back injury and surgery. Subjective complaints caused by an aggravation of a pre-existing condition are not compensable under the 2011 amendments to the workers compensation act.⁸

Claimant timely appealed.

⁷ P.H. Trans. at 62-64.

⁸ P.H. Order.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b provides, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

Both K.S.A. 2012 Supp. 44-508(f)(1) and K.S.A. 2010 Supp. 44-508(e) state "personal injury" or "injury" is a "lesion or change in the physical structure of the body, causing damage or harm thereto." The pre-May 15, 2011 statute noted, "It is not essential that such lesion or change be of such character as to present external or visible signs of its existence." Such language is omitted in the current version of the statute.

Dr. Stein identified three possible diagnoses of piriformis syndrome, undocumented radicular irritation and hip joint disease. Dr. Mellion only identified an exacerbation of a preexisting condition. As observed by Judge Moore, neither neurosurgeon documented a lesion or change in the physical structure of claimant's body. While claimant explained why and how her current symptoms are new and different as compared to her preexisting condition, the law in effect from May 15, 2011 forward requires a documented lesion or physical change in the body.⁹ Such proof is lacking in this case. Judge Moore advised the parties that if claimant produces new or different evidence demonstrating a new lesion or change in the physical structure of her body, he would reconsider, but he would not award benefits at this juncture of the claim based on claimant's subjective complaints alone.

⁹ See *Priest v. Foot Locker Retail, Inc.*, No. 1,062,248, 2013 WL 2455713 (Kan. WCAB May 1, 2013).

This Board Member agrees with Judge Moore that claimant did not satisfy her burden to prove she sustained personal injury as defined under the law in effect on the date of her September 20, 2012 accident. This Board Member is uncertain, based on the current evidence, regarding whether claimant proved more than a “sole” aggravation, acceleration or exacerbation of a preexisting condition or if her September 20, 2012 accident rendered a preexisting condition symptomatic.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties’ arguments, the undersigned Board Member concludes claimant failed to prove personal injury as defined by the post-May 15, 2011 law.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member affirms Administrative Law Judge Bruce E. Moore’s May 10, 2013 preliminary hearing Order.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Bruce E. Moore

¹⁰ K.S.A. 44-534a.